IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-855

WARNER-LAMBERT COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

BRIEF OF AMERICAN ADVERTISING FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. ROGAL
Attorney for Amicus Curiae

SLOANE & ROGAL
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-2133

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

WARNER-LAMBERT COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

BRIEF OF AMERICAN ADVERTISING FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

The American Advertising Federation (AAF) is a national trade association which includes within its membership all of the various elements of the advertising industry. The membership includes approximately 100 companies who sell and advertise consumer products, 100 advertising agencies, 78 advertising media companies, including magazine and newspaper publishers, radio and television broadcasters and radio and television networks. Approximately 22 additional trade associations with memberships composed of companies engaged in various advertising pursuits are members of AAF. AAF is also the parent body of 163 local advertising clubs and federations having a combined

membership of approximately 30,000 advertising practitioners.

AAF's interest in this proceeding includes but transcends the interest of petitioner, Warner-Lambert, for all of its national membership is subject to the jurisdiction of the Federal Trade Commission and will be affected by the precedent which will be established.

In the proceeding before the Circuit Court of Appeals, AAF filed a brief, *amicus curiae,* supporting Warner-Lambert's position on Part III of the Commission's Order to Cease and Desist. This brief is similarly limited to the questions raised by the Commission's assumption of power or authority to order corrective advertising.

While there is no need for *amicus* to restate Warner-Lambert's statement of the case, which we adopt, we deem it appropriate at this juncture to set out, in full text, the corrective advertising portion of the Commission's Order, as amended by the Circuit Court:

Part III

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:

> Listerine will not help prevent colds or sore throats or lessen their severity.

In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, e.g., English, Spanish, principally employed in the advertisement.

The aforesaid duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972. (Pet. App. 46a-47a, 74a-75a)

REASONS FOR GRANTING THE WRIT

A. The Commission Lacks the Power to Proscribe Advertising Which Is Wholly Truthful

The Federal Trade Commission's authority to issue orders directing advertisers to cease and desist from unfair or deceptive practices stems entirely from § 5(b) of its organic act (15 U.S.C. § 45(b)) which reads, in pertinent part:

> (b) . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it . . . shall issue . . . an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice.

The statutory language clearly and unambiguously limits the scope of orders to requiring Commission re-

spondents "to cease and desist from using" methods, acts or practices found to be in violation of the Act. Parts I and II of the order to Warner-Lambert, if otherwise justified, are clearly sanctioned by the provisions of the Act. If finally approved, they will surely bring a complete end to all of the acts and practices found by the Commission to be unlawful. By so doing, Parts I and II effectively exhaust the Commission's remedial powers. As stated by Judge Prettyman, writing for the majority, in *Alberty et al* v. *Federal Trade Commission,* 182 F. 2d 36, 40 (D.C. Cir.), cert. denied, 340 U.S. 818 (1950): "It seems to us that the limit of the Commission's power is to require that a product be truthfully represented, and that it has no power to require additional negative statements except as the act itself indicates, i.e., where the affirmative representations require further explanation or where the consequences of using the product require further warning".

This reasoning has been consistently followed by courts reviewing FTC orders requiring additional statements in future advertising and labelling. The Commission and the Circuit Court, below, rely heavily on *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 F. 744 (2d Cir. 1922) in which an order was upheld requiring future disclosure in advertising and labelling that the active ingredient of the product was phosphate. After many years of promoting its "Dr. Price's Baking Powder" as a "premium" product because of its cream-of-tartar content and disparaging competing products made with cheaper phosphate, Royal changed its product's base from cream-of-tartar to phosphate. The opinion below erroneously views the *Royal* order as based upon findings that

Royal's advertisements were deceptive because "they did not advise consumers that their reasons for buying the powder in the past no longer applied." (Pet. App. 69a). But the order was not solely based upon Royal's failure to disclose that the product had been materially changed but upon findings that the new, postformulation change advertisements were affirmatively deceptive and constituted part of a campaign ". . . to create a belief on the part of the public that the new powder which it was placing on the market was in fact Price's Baking Powder, which had been well known for 60 years as a cream-of-tartar powder, and to conceal or obscure the fact that it was a radically different powder." 281 F. at 749. The manufacturer was "passing off one of his products for another of his own products". 281 F. at 753. In short, the order in *Royal* was not designed to correct beliefs instilled by prior advertising but to prevent deception occasioned by current advertising. It enjoined an ongoing deceptive campaign.

The Circuit Court also relies heavily upon *Waltham Precision Instrument Co.* v. *Federal Trade Commission,* 327 F. 2d 427 (7th Cir.), Cert. denied, 377 U.S. 992 (1964) and *Waltham Watch Co.* v. *FTC,* 318 F. 2d 28 (7th Cir.), Cert. denied, 375 U.S. 944 (1963). Incorrectly, the Court below characterizes the orders issued in those cases as responsive to ads and labels which ". . . were strictly truthful, but they became misleading when considered in light of past advertisements." (Pet. App. 70a, n. 57). This statement overlooks the fact that the Commission in *Waltham Precision* found that the false impression had been created "in part through respondent's own efforts". 61 F.T.C. 1027, 1049 (1962). These "own efforts" consisted of

placing advertisements which affirmatively represented, contrary to fact, that ". . . the old Waltham firm is still manufacturing all parts of its watches in the United States". Advertisements contained statements such as "Waltham, the first American watch company" and "Waltham is the first American standardized watch". 61 F.T.C. at 1048. Moreover, the order in *Waltham Precision* did not require affirmative disclosure in all advertising but only in advertising which used the name Waltham. The order was based upon the proposition that "the Commission has always prohibited the use of names which carry false implication of a product's country of origin." *Id.* See *El Moro Cigar Co.* v. *FTC,* 107 F. 2d. 429 (4th Cir. 1939).

Similarly, in *Waltham Watch Company* v. *FTC,* supra, Waltham's licensee had engaged in advertising practices "cunningly devised to deceive" the public into believing that imported clocks were American made products of a long established domestic manufacturer. The order requiring affirmative disclosure of foreign origin was affirmed on the legal principle "the owner of a trademark or trade name may not use, nor permit the use of such trademark or trade name in a manner designed to deceive the public." 318 F. 2d at 31-32.

The Circuit Court, below, refused to recognize that this is a case of first impression. It dismisses the distinctions between this case and "earlier corrective advertising cases" as "semantic". (Pet. App. p. 71a, n. 59.) In fact, there are no litigated "earlier corrective advertising cases" but only cases which enjoined future false advertising abuses. The earlier orders cited

by the Commission and the Circuit Court were fashioned to protect the public from future deception created by statements or omissions in the affected advertising. None of the earlier cases would have involved affirmative disclosure in advertising if the subject companies had not demonstrated bad faith by engaging in advertising practices calculated to deceive the public into believing that the advertised product was something it was not. The Commisison's policy with respect to "foreign origin" cases over the years has been only to require disclosure in labelling or on point of sale materials that the product was made abroad. 2 Trade Regulation Reporter § 7551. As Commissioner Elman's opinion, in *Manco Watch Strap Co., Inc., et al,* 60 F.T.C. 495, 515, n. 25 (1962), points out: "We deal here only with the question of origin markings on the products themselves. Advertising matter presents another question. Both the burden of requiring disclosures of foreign origin in all advertisements, and the extent of the protection of the public to be derived from such a requirement, assuming adequate disclosure is made on the package and product, are significantly different."

The cases cited by the Circuit Court (Pet. App. 67a) involving products sold to remedy baldness, tiredness and bedwetting are all clearly distinguishable. Affirmative disclosures in advertising as to the products' limitations were required because the advertisements involved were clearly deceptive in implying, contrary to fact, that the products would be generally effective for these conditions no matter what their cause. The affirmative disclosure orders were based upon findings that the affected advertisements were, in themselves, deceptive. When, as here, such deception

is absent the courts have consistently refused to affirm advertising disclosure orders. *FTC* v. *Simeon Management Corp.*, 532 F. 2d 708 (9th Cir. 1976); *Alberty* v. *FTC*, 182 F. 2d 36 (D.C. Cir.), Cert. denied, 340 U.S. 818 (1950).

The record reveals that public beliefs, created by advertising, are, like colds, a self limiting phenomena. The prevalance of the belief diminishes when it is no longer reinforced by continued advertising. (Pet. App. 30a-31a). In *Royal* and *Waltham*. the advertisers had sought to create new false beliefs by means of continuing false advertising campaigns. Thus, the FTC orders requiring affirmative disclosure were needed to surely bring an end to the continuing practice of representing the products to be something they were not. The order in this case deals with a transient belief, already on the wane, and is designed to hasten or accelerate a result which will sooner or later occur, with or without the order. Thus, the corrective advertising provision is not founded upon absolute necessity but upon impatience with the progress of a natural process. It is not aimed at ending an act or practice but at the temporary results of a discontinued act or practice. Viewed in this light, the order clearly exceeds the FTC's statutory powers. Justice Brandeis' famous dissent in *Gratz*, long since adopted as the correct interpretation of the Federal Trade Commission Act (*FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966)) describes the nature of the Commission's powers in these words:

> In considering whether the complaint is sufficient, it is necessary to bear in mind the nature of the proceeding under review. The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It *is not* remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public.
>
> * * * * *
>
> Its [FTC] action was to be prophylactic. Its purpose . . . was prevention . . . not cure.
>
> *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 432, 435 (1920); emphasis added.

B. Part III of the Order to Cease and Desist Violates the First Amendment to the Constitution

The courts have consistently held that no one has a constitutional right to advertise falsely, E.g., *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 189-92 (1948); *E. F. Drew & Co.* v. *FTC*, 235 F. 2d 735, 739-40 (2nd Cir. 1956). But that issue does not arise in this case for, contrary to the Circuit Court's holding (Pet. App. 91a), the Commission pointedly refused to adopt the Administrative Law Judge's view that future "bad breath" advertisements which referred to Listerine's unchallenged germ killing properties would be misleading in the absence of a corrective message. (Pet. App. 31a-32a). The Commission based its corrective order solely upon findings, backed by only opinion evidence, that consumers would retain the lingering belief that Listerine was effective for colds for five or more years after discontinuance of the cold related advertisements. (Pet. App. 30a, 31a). Thus, the advertising burdened by Part III of the order is, in and

of itself, wholly truthful. The order flatly prohibits all truthful commercial speech with respect to Listerine unless the government mandated, unrelated message is included therein.

Viewed in this light it is apparent that past decisions of this court offer no support for the Circuit Courts' decisions. The panel's reliance upon the restatement of settled law set out in footnote 24 of this Court's opinion in *Virginia State Board of Pharmacy* v. *Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748, 772 (1976), is clearly unavailing. Nothing said in the footnote sanctions government interference with truthful advertising. It merely endorsed the hoary principle that regulators may constitutionally ". . . require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers as are necessary to prevent *its* being deceptive." (emphasis supplied) It seems obvious that this restatement has no application when "it", i.e., the commercial message, lacks the capacity to deceive.

But the basic principle announced in *Virginia State Board* and the earlier *Bigelow* v. *Virginia*, 421 U.S. 809 (1975) does have clear application to these facts. In both of those cases, the state applied sanctions to advertising which was wholly truthful. The State's purposes were, as the Commission's purpose is here, unrelated to the truth or falsity of the affected advertising. In *Bigelow*, the state contended that its prohibitory statute was designed to maintain the quality of medical care and to protect pregnant women from injurious fee splitting practices. 421 U.S. at 827. In *Virginia Pharmacy Board*, the state's interest was stated to be protection of the public by preventing low

cost, low quality pharmacists from driving reputable pharmacists out of business. 425 U.S. at 766. These were truly legitimate purposes or interests but in both cases this court was unpersuaded that the state's methods were necessary to achieve the desired objective. In *Linmark Associates, Inc.* v. *Township of Willingboro*, 97 S. Ct. 1614, 1619 (1977), this Court, referring to its holding in *Virginia Pharmacy Board*, held that not only was it unconvinced that the restrictive statute was necessary but also that it was "convinced that, *in any event*, the First Amendment disabled the State from achieving its goal by restricting *the free flow of truthful information*". (emphasis supplied).

As we read them, *Linmark* and its predecessors hold that the right protected by the First Amendment to freely disseminate truthful commercial messages is paramount and supersedes even the legitimate public protection rights, goals or purposes of government. These holdings do not question nor imperil the state's right and duty to protect the public but only the method employed. In essence, this Court weighed the conflicting interests served by the regulations or regulators against the First Amendment issue at stake and, insofar as wholly truthful commercial speech is concerned, decided that the Constitutional right is absolute.

Despite the fact that the order issued to Warner-Lambert is probably the most far reaching advertising order ever issued by the Commission, the Circuit Court majority held "the corrective advertising order in this case is the least restrictive means of achieving a substantial and important governmental objective. . . . ." (Pet. App. 92a). In the Circuit Court's view, that gov-

ernmental interest" will not be substantially served by the less restrictive remedy—a cease and desist order." (Pet. App. 93a). Thus, the court below appears to hold the view that the Commission's arsenal of possible remedies was limited to only two choices—corrective advertising or a simple order directing cessation of representations as to Listerine's efficacy with respect to colds and sore throats. It is obvious that the FTC's choice was not so limited and that, in fact, it selected the most restrictive of the available remedies. For example, it could have reached its desired goal by requiring public notification in some manner unrelated to truthful advertising. It could have required that a statement negating cold fighting efficacy be inserted in all advertisements which referred to Listerine's germicidal properties. See *J.B. Williams Co.* v. *FTC,* 381 F. 2d 884 (6th Cir. 1967). The FTC's order could have been limited, as was the order in *National Commission on Egg Nutrition,* 88 FTC 89, Aff'd. as modified, Nos. 76-1969 and 76-1975 (7th Cir. Nov. 29, 1977), to requiring a statement in cold related advertisements that a controversy exists among experts and Warner-Lambert is presenting its side. There are many other possibilities and the Commission has, in recent years, demonstrated that it does not lack imagination in devising effective orders. See, e.g. *Souped Up Affirmative Disclosure Orders of the Federal Trade Commission,* 41 U. Mich. J.L. Reform 180 (1970). In short, disapproval of this drastic remedy does not deprive the Commission of the power to protect the public but merely announces that wholly truthful advertising is constitutionally immune from restraints of this type.

CONCLUSION

For the foregoing reasons and the reasons contained in Warner-Lambert's petition, the requested writ of certiorari should issue.

Respectfully submitted,

WILLIAM W. ROGAL
Attorney for amicus curiae,
American Advertising
Federation

SLOANE & ROGAL
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-2133

February 7, 1978